Supreme Court, U.S.
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No. 92-989

In The

Supreme Court of the United States

October Term, 1992

STATE OF TENNESSEE,

Petitioner,

vs.

DONALD RAY MIDDLEBROOKS,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Tennessee

JOINT APPENDIX

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* Pursuant to Rule 26.1 of this Court, the opinion of the Supreme Court of Tennessee is not reprinted in this Joint Appendix since it appears in the appendix to the petition for certiorari at A1-A86.

RELEVANT DOCKET ENTRIES

Date	Proceeding
September 14, 1987	Middlebrooks indicted for the first-degree murder, aggravated kidnapping, armed robbery and aggravated sexual battery of Kerrick Majors
September 15, 1989 – September 22, 1989	Trial and sentencing hearing
September 8, 1992	Tennessee Supreme Court affirms conviction but reverses sentence of death

INDICTMENT

State of Tennessee, Davidson County

COUNT ONE

SEPTEMBER **Term of the Criminal Court, 1987**

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn and charged to inquire for the body of the County of Davidson, and State aforesaid, upon their oath aforesaid, present:

That DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS

of said County, heretofore, to-wit: On the 26th *day of* April *, 19* 87*, with force and arms, in the County aforesaid and prior to the return of this indictment, unlawfully, feloniously, willfully, deliberately, premeditatedly and maliciously or while in the perpetration of a felony, to wit: Kidnapping or Larceny, did make an assault upon the body of one*

Kerrick Lamar Majors

and the said DONALD RAY MIDDELBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS

then and there did unlawfully, feloniously, willfully, deliberately, premeditatedly, and of ~~x~~their *malice aforethought, kill and murder the said* Kerrick Lamar Majors

against the peace and dignity of the State.

State of Tennessee, Davidson County

COUNT TWO

SEPTEMBER **TERM OF THE CRIMINAL COURT, 1987**

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn and charged, to inquire for the body of the County of Davidson and State aforesaid, upon their oath aforesaid, present: That DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS

heretofore, to-wit, on the 26th *day of* April *, 19* 87 and prior to the return of this indictment *with force and arms, in the County aforesaid, unlawfully,* and feloniously did seize, confine, inveigle, abduct, conceal, kidnap or carry away another, Kerrick Lamar Majors, with the felonious intent to cause the said Kerrick Lamar Majors to be confined secretly against his will, while the said DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS were armed with a deadly weapon, to wit: a knife, in violation of Section 39-2-301 Tennessee Code Annotated and against the peace and dignity of the State of Tennessee.

State of Tennessee, Davidson County

COUNT THREE

SEPTEMBER TERM OF THE CRIMINAL COURT, 19 87

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn, and charged to inquire for the body of the County of Davidson, and State aforesaid, upon their oath aforesaid, present: That: DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS

heretofore, and prior to the finding of this indictment, to-wit, on the 26th *day of* April , *19* 87, *with force and arms, in the County aforesaid, unlawfully and feloniously did make an assault upon the body of one* Kerrick Lamar Majors , and him/~~she~~ the said in fear and danger of his/~~her~~ life, and then and there unlawfully, feloniously, and violently did steal, take, and carry away from the person and against the will of the said Kerrick Lamar Majors

certain personal property, to-wit: jewelry, a better description of which being to the Grand Jurors unknown

of the value of under Two Hundred ($200.00) *DOLLARS the property of the said* Kerrick Lamar Majors , *said robbery being accomplished by the use of a deadly weapon, to-wit: a* knife

contrary to the form of the statues in such cases made and provided, and against the peace and dignity of the State of Tennessee.

State of Tennessee, Davidson County

COUNT FOUR

SEPTEMBER TERM OF THE CRIMINAL COURT, 1987

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn and charged, to inquire for the body of the County of Davidson and State aforesaid, upon their oath aforesaid, present: That DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS

heretofore, to-wit, on the 26th *day of* April , *19* 87 and prior to the return of this indictment

with force and arms, in the County aforesaid, unlawfully, and feloniously did have unlawful sexual contact with another, to wit: Kerrick Lamar Majors, with force or coercion, while the said DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDLEBROOKS were armed with a deadly weapon, to wit: a knife, and the said DONALD RAY MIDDLEBROOKS, ROBERT ROGER BREWINGTON, JR. AND TAMMIE ELIZABETH MIDDELBROOKS were aided and abetted by one or more persons, in violation of Section 39-2-606 Tennessee Code Annotated and against the peace and dignity of the State of Tennessee.

/s/ Thomas H. Shriver
Attorney-General

JURY INSTRUCTION FROM GUILT PHASE

* * *

[p. 1719] State of Tennessee versus Donald Ray Middlebrooks. Case number – 87F-1681. Member of the Jury: Count one of the indictment in this case charges the defendant, Donald Ray Middlebrooks, with the offense of murder in the first degree. This offense embraces the lesser included offense of murder in the second degree, voluntary manslaughter, and involuntary [p. 1720] manslaughter.

* * *

[p. 1727] All persons aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders and punished as such. An aider and abettor is one who advises, counsels, procures or [p. 1728] encourages another to commit a crime.

The law does not require a strict, actual, eyewitness presence at the scene of the crime. Only a constructive presence is necessary to charge one as an aider and abettor. As a general rule, one is deemed to be constructively present if he is, at the time, performing any act in furtherance of the felony, or is in a position to give information which would aid the actual perpetrator or which would prevent others from discouraging and stopping the perpetrator. It is immaterial at which – excuse me, it is immaterial at what distance the alleged aider and abettor may be from the scene of the crime.

Constructive or actual presence, however, is not sufficient to make one a principal of the crime. There must

be some evidence, at least circumstantial, that the defendant knowingly participated in the crime. The defendant must have had knowledge of the crime being committed, and an intent to aid and abet. An aider and abettor, who has knowledge of the principal's unlawful intent, and assists the principal, is guilty in the same degree as the principal. When the aider and abettor does not share in the principal's intent, however, but is controlled by his own intent, the degree of guilt of the aider and abettor is not necessarily that of the principal. In determining the degree of the defendant's guilt, you should consider his criminal intent, and not the [p. 1729] intent and degree of guilt of the principal offender, whom the defendant is accused of aiding and abetting.

* * *

[p. 1730] Count One. I shall now proceed to explain to you what in law it takes to constitute the offense of murder in the first degree, as charged in count one of the indictment.

[p. 1731] Section 39-2-201 of the *Tennessee Code Annotated* provides as follows:

If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder.

Section 39-2-202A of the *Tennessee Code Annotated* provides as follows:

Every murder perpetrated by means of poison, lying in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, is murder in the first degree.

[p. 1732] Any person who willfully, deliberately, maliciously, and with premeditation kills another person is guilty of murder in the first degree.

For you to find the defendant guilty of murder in the first degree which is unlawful, malicious, willful, deliberate and premeditated, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was malicious; that is, that the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse;

(3) that the killing was willful; that is, that the defendant intended to take the life of the alleged victim;

(4) that the killing was deliberate; that is, with cool purpose; and

(5) that the killing was premeditated.

Malice is an essential ingredient of this offense, and it may be either express or implied. A case of homicide cannot be murder unless, at and before the killing, the

wicked intent, constituting malice aforethought, exists in the mind of the slayer. Malice is an intent to do an injury to another, a design formed in the mind of doing mischief to another.

[p. 1733] Express malice is actual malice against the party slain, and exists where a person actually contemplates the injury or wrong he inflicts. Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved, and malignant spirit, and heart regardless of social duty and fatally bent on mischief. Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed, but death resulted from a consciously, unlawful act done intentionally, and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In this event, there is implied such a high degree of conscious and willful recklessness as to amount to that malignity of heart constituting malice.

If a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then you may infer malice sufficient to support a conviction of murder in the first degree, which is unlawful, malicious, willful, deliberate, and premeditated, but, again, this inference may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the defendant, or exists in the evidence of the State. A deadly weapon is any weapon or instrument which, from the manner in which it is used, or attempted to be used, is likely to produce death or cause [p. 1734] great bodily injury.

Malice cannot be inferred from deadly intent only, because the deadly intent may be justifiable under the law, as where one willfully kills another to save his own life, or to save himself from great bodily harm, and the danger is imminent and immediate, or when the intent to kill is produced by anger, for if it were sudden and upon reasonable provocation, the killing might or might not be manslaughter, but it would not be murder.

You are reminded that the State always has the burden of proving every element of the crime charged beyond a reasonable doubt. A permissible inference may or may not be drawn from an elemental fact from proof by the State of a basic fact. However, all inferences permitted to be drawn may be rebutted. An inference does not place any burden of proof of any kind upon the defendant.

Premeditation means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval. The mental state of the accused at the time he allegedly instigated the act which resulted in the alleged death of the deceased must be carefully considered in [p. 1735] order to determine whether the accused was sufficiently free from excitement and passion to be capable of premeditation. Passion does not always reduce the crime below murder in the first degree, since a person may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and, to a large extent, controlled by passion at the time. If

the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a passion or an excited state when the design was carried into effect.

In addition to indicting the defendant for murder in the first degree which is unlawful, malicious, willful, deliberate, and premeditated, in Count One in the same count, the State has indicted the defendant, alternatively, for murder in the first degree in the perpetration of a felony, to-wit: kidnapping or larceny. This offense has different elements that murder in the first degree which is unlawful, malicious, willful, deliberate, and premeditated. I shall now proceed to explain to you what in law it takes to constitute the offense of first degree murder in the perpetration of a felony.

A person commits murder in the first degree in the perpetration of a felony if he kills any person during the perpetration of, or attempt to perpetrate certain specified felonies, including kidnapping or larceny. Kidnapping is the [p. 1736] offense of forcibly or unlawfully confining, inveigling, or enticing away another, with the intent of causing him to be secretly confined against his will. Larceny is the offense of felonious taking and carrying away the personal goods of another, and is either grand or petit in degree.

For you to find the defendant guilty of murder in the first degree in the perpetration of a felony, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was committed during the alleged perpetration or attempt to perpetrate the alleged kidnapping or larceny; that is, that the killing was closely connected to the alleged kidnapping or larceny, and was not a separate, distinct, and independent event; and

(3) that the defendant specifically intended to commit the alleged kidnapping or larceny.

If you should find that the above three elements exist beyond a reasonable doubt, it is not necessary that the State prove an intention to kill, or that the alleged killing was done willfully, deliberately, with premeditation, and with malice.

If, after considering all the evidence and the Court's instructions, you find beyond a reasonable doubt that [p. 1737] the defendant, Donald Ray Middlebrooks, is guilty of murder in the first degree which is unlawful, malicious, willful, deliberate, and premeditated, or murder in the first degree in the perpetration of a felony, as charged alternatively in Count One of the indictment, you should find him guilty.

If you so find, then it shall be your duty after a separate sentencing hearing to determine whether the defendant will be sentenced to death or life imprisonment, but you will not consider punishment for this offense at this time.

On the other hand, if you find the defendant, Donald Ray Middlebrooks, not guilty of murder in the first degree which is unlawful, malicious, deliberate and premeditated, or murder in the first degree in the perpetration of a felony, as charged alternatively in Count One of

the indictment, or if you have a reasonable doubt thereof, then your verdict must be not guilty as to both of these offenses, and next proceed to determine his guilt or innocence as to the lesser included offense of murder in the second degree.

I shall now proceed to explain to you what in law it takes to constitute the offense of murder in the second degree as included in Count One of the indictment.

Section 39-2-202(A) of the *Tennessee Code Annotated* provides as follows:

Every murder perpetrated by means of poison, lying [p. 1738] in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, is murder in the first degree.

Section 39-2-211(A) of the *Tennessee Code Annotated* further provides:

All other kinds of murders shall be deemed murder in the second degree.

Any person who kills another person with malice aforethought, either express or implied, is guilty of murder in the second degree.

For you to find the defendant guilty of murder in the second degree while employing a firearm, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully and willfully killed the alleged victim, and;

(2) that the killing was malicious.

If one person, upon a sudden heat of passion, without adequate provocation, and disconnected with any previously formed design to kill, kills another willfully and maliciously, such killing is unlawful, and is murder in the [p. 1739] second degree.

Malice is an essential ingredient of this offense, and it may be either express or implied. The definition of malice, the circumstances under which it exists, and when and from what malice may be inferred and proper rebuttal made are set forth under the jury's charge on murder in the first degree which is unlawful, malicious, willful, deliberate, and premeditated, and you should refer to that portion of the charge as you deem it appropriate or necessary to do so.

If, after considering all the evidence and the Court's instructions, you find beyond a reasonable doubt that the defendant, Donald Ray Middlebrooks, is guilty of murder in the second degree, as included in Count One of the indictment, then you should find him guilty.

The Court will thereafter set the punishment after a separate sentencing hearing.

On the other hand, if you find the defendant, Donald Ray Middlebrooks, not guilty of murder in the second degree, as included in Count One of the indictment, or if you have a reasonable doubt thereof, then your verdict must be not guilty as to this offense, and next proceed to

determine his guilt or innocence as to the lesser included offense of voluntary manslaughter.

I shall now proceed to explain to you what in law it takes to constitute the offense of voluntary manslaughter, as [p. 1740] included in Count One of the indictment.

Section 39-2-221 of the *Tennessee Code Annotated* provides as follows:

Manslaughter is the unlawful killing of another without malice, either express or implied, which may be either voluntary upon a sudden heat, or involuntary, but in the commission of some unlawful act.

Any person who intentionally kills another person, without malice, but upon a sudden heat of passion produced by provocation adequate to obscure the reason of an ordinary person is guilty of voluntary manslaughter.

For you to find the defendant guilty of voluntary manslaughter, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing was willful; that is, the defendant intended to take the life of the alleged victim;

(3) that the defendant acted in a state of passion sufficient to obscure his reason; and

(4) that the passion was produced by a reasonable and adequate provocation; that is, in the mind of an average reasonable person, the provocation would stir

resentment likely to cause violence, obscure the reason, and lead to action from passion rather than judgment.

[p. 1741] If the intention and the act are the result of impulse and passion, the idea of malice is negated. Killing on a sudden heat of passion, without malice, distinguishes voluntary manslaughter from murder in the second degree.

If, after considering all the evidence and the Court's instructions, you find beyond a reasonable doubt that the defendant, Donald Ray Middlebrooks, is guilty of voluntary manslaughter, as included in Count One of the indictment, then you should find him guilty.

The Court will thereafter set the punishment after a separate sentencing hearing.

On the other hand, if you find the defendant, Donald Ray Middlebrooks, not guilty of voluntary manslaughter, as included in Count One of the indictment, or if you have a reasonable doubt thereof, then your verdict must be not guilty as to this offense, and next proceed to determine his guilt or innocence as to the lesser included offense of involuntary manslaughter.

I shall now proceed to explain to you what in law it takes to constitute the offense of involuntary manslaughter, as included in Count One of the indictment.

Section 39-2-221 of the *Tennessee Code Annotated* provides as follows:

Manslaughter is the unlawful killing of another without malice, either express or implied, which may be [p. 1742] either voluntary upon a sudden heat, or involuntary, but in the commission of some unlawful act. Any

person who kills another person while committing an unlawful act, or an act not strictly unlawful in itself, but done with gross and culpable negligence, and while not intending death nor bodily harm to result from commission of the act, though death was the natural and probable result of the act, is guilty of involuntary manslaughter.

For you to find the defendant guilty involuntary manslaughter while – excuse me. There is a typographical error. I'm striking a clause, obscuring it with ink, and initialing that, and pay no attention to that whatsoever. It is just a clerical error. I'll start the sentence again.

For you to find the defendant guilty of involuntary manslaughter, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant unlawfully killed the alleged victim;

(2) that the killing resulted from the defendant's commission of:

(a) an unlawful act, or

(b) an act not strictly unlawful in itself, but done with gross and culpable negligence; and

[p. 1743] (3) that death was the natural and probable result of the defendant's act.

Gross and culpable negligence is negligence that the defendant knew or reasonably should have known might endanger human life; it is not enough that the defendant

was merely guilty of want of due care, inadvertence, or inattention.

If, after considering all the evidence and the Court's instructions, you find beyond a reasonable doubt that the defendant, Donald Ray Middlebrooks, is guilty of involuntary manslaughter, as included in Count One of the indictment, then you should find him guilty.

On the other hand, if you find the defendant, Donald Ray Middlebrooks, not guilty of involuntary manslaughter, as included in Count One of the indictment, or if you have a reasonable doubt thereof, then your verdict must be not guilty as to this offense, and next proceed to determine his guilt or innocence as to Count Two of the indictment.

* * *

[p. 1758] You will be provided with a form for all possible verdicts in this case. For each count, the jury will check the appropriate verdict on the form, and your foreperson will sign the verdict form. The verdict form which you will receive reads as follows:

In the Criminal Court for Davidson County, Tennessee, Division Three.

State of Tennessee versus Donald Ray Middlebrooks.

Number 87-F-1682, Verdict Form.

Count One

We, the jury, find the defendant, Donald Ray Middlebrooks:

(1) not guilty of the charged offense, or any specified lesser included offense, or

(2) guilty of murder in the first degree which is unlawful, malicious, willful, deliberate, and premeditated, as charged in Count One of the indictment, or

[p. 1759] (3) guilty of murder in the first degree in the perpetration of a felony, to-wit: kidnapping as charged in Count One of the indictment, or

(4) guilty of murder in the first degree in the perpetration of a felony, to-wit: larceny as charged in Count One of the indictment, or

(5) guilty of murder in the second degree as included in Count One of the indictment, or

(6) guilty of voluntary manslaughter as included in Count One of the indictment, or

(7) guilty of involuntary manslaughter as included in Count One of the indictment.

Count Two

We, the jury, find the defendant, Donald Ray Middlebrooks:

(1) not guilty of the charged offense, or any specified lesser included offense, or

(2) guilty of aggravated kidnapping, as charged in Count Two of the indictment, or

(3) guilty of kidnapping as included in Count Two of the indictment.

Count Three

We the jury, find the defendant, Donald Ray [p. 1760] Middlebrooks:

(1) not guilty of the charged offense, or any specified lesser included offense, or

(2) guilty of robbery by use of a deadly weapon, as charged in Count Three of the indictment, or

(3) guilty of robbery, as included in Count Three of the indictment, or

(4) guilty of larceny from the person as included in Count Three of the indictment.

Count Four

We, the jury, find the defendant, Donald Ray Middlebrooks:

(1) not guilty of the charged offense, or any specified lesser included offense, or

(2) guilty of aggravated sexual battery of Kerrick Lamar Majors on the 26th day of April, 1987, as charged in Count Four of the indictment, or

(3) guilty of sexual battery of Kerrick Lamar Majors on the 26th day of April, 1987, as included in Count Four of the indictment.

On each count, there is the instruction to check one before the choices are provided. The form continues:

This is our verdict.

[p. 1761] This the (blank) day of September, 1989, with a signature line for the foreperson.

* * *

VERDICT FORM FROM GUILT PHASE

IN THE CRIMINAL COURT FOR
DAVIDSON COUNTY, TENNESSEE
DIVISION III

STATE OF TENNESSEE)
VS.)
) No. 87-F-1682
DONALD RAY MIDDLEBROOKS)

VERDICT FORM

COUNT ONE [check one]

We, the Jury, find the defendant, Donald Ray Middlebrooks,

1. __ not guilty of the charged offense or any specified lesser included offense.

OR

2. __ guilty of Murder in the First Degree Which is Unlawful, Malicious, Willful, Deliberate and Premeditated as charged in Count One of the indictment.

OR

3. ✓ guilty of Murder in the First Degree in the Perpetration of a Felony, to-wit: Kidnapping as charged in Count One of the indictment.

OR

4. __ guilty of Murder in the First Degree in the Perpetration of a Felony, to-wit: Larceny as charged in Count One of the indictment.

OR

5. __ guilty of Murder in the Second Degree as included in Count One of the indictment.

OR

6. __ guilty of Voluntary Manslaughter as included in Count One of the indictment.

OR

7. __ guilty of Involuntary Manslaughter as included in Count One of the indictment.

COUNT TWO [check one]

We, the Jury, find the defendant, Donald Ray Middlebrooks,

1. __ not guilty of the charged offense or any specified lesser included offense.

OR

2. ✓ guilty of Aggravated Kidnapping as charged in Count Two of the indictment.

OR

3. __ guilty of Kidnapping as included in Count Two of the indictment.

COUNT THREE [check one]

We, the Jury, find the defendant, Donald Ray Middlebrooks,

1. ✓ not guilty of the charged offense or any specified lesser included offense.

OR

2. __ guilty of Robbery by Use of a Deadly Weapon as charged in Count Three of the indictment.

OR

3. __ guilty of Robbery as included in Count Three of the indictment.

OR

4. __ guilty of Larceny from the Person as included in Count Three of the indictment.

COUNT FOUR [check one]

We, the Jury, find the defendant, Donald Ray Middlebrooks,

1. ✓ not guilty of the charged offense or any specified lesser included offense.

OR

2. __ guilty of Aggravated Sexual Battery of Kerrick Lamar Majors on the 26th day of April, 1987, as charged in Count Four of the indictment.

OR

3. __ guilty of Sexual Battery of Kerrick Lamar Majors on the 26th day of April, 1987, as included in Count Four of the indictment.

This is our verdict.

This the 19 day of September, 1989.

/s/ B. Lanham
FOREPERSON

Jury Instructions from Sentencing Phase

* * *

[p. 2192] Ladies and gentlemen of the Jury, you have found the defendant guilty beyond a reasonable doubt of murder in the first degree as charged in Count One of Indictment Number 87-F-1682.

It is now your duty to determine within the limits prescribed by law the penalty which shall be imposed as punishment for this offense. *Tennessee Code Annotated* Section 39-2-202(b) provides that a person convicted of murder in the first degree shall [p. 2193] be punished by death or by imprisonment for life.

The evidence and arguments in this hearing have been completed. And it is my duty now to instruct you as to the law. The law applicable to this case is stated in these instructions, and it is your duty to carefully consider all of them. The order in which these instructions are given is no indication of their relative importance. You should not single out one or more of them to the exclusion of another or others, but should consider each one in the light of and in harmony with the others.

At times during this hearing, I have ruled upon the admissibility of evidence. You must not concern yourself with these rulings. Neither by such rulings, these instructions, nor any other remarks which I have made, do I mean to indicate any opinion as to the facts or as to what your verdict should be.

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and

applying the law, but they are not evidence. If any statements or arguments were made that you believe are not supported by the evidence, you should disregard them.

You are the exclusive judges of the facts [p. 2194] in this case. Also, you are the exclusive judges of the law under the direction of the Court. You should apply the law to the facts in deciding this case. You should consider all of the evidence in the light of your own observations and experience in life.

You are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony. If there are conflicts in the testimony of the different witnesses, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely for the law presumes that all witnesses are truthful.

In forming your opinion as to the credibility of a witness, you may look to the proof, if any, of his or her general character, the evidence, if any, of the witness' reputation for truth and veracity, the intelligence and respectability of the witness, his or her interest or lack of interest in the outcome of the trial, his or her feelings, his or her apparent fairness or bias, his or her means of knowledge, the reasonableness of his or her statements, his or her appearance and demeanor while testifying, his or her contradictory statements as to material matters, if any are shown, and all the evidence in the case tending [p. 2195] to corroborate or to contradict him or her.

A witness may be impeached by a careful cross-examination involving the witness in contradictory, unreasonable and improbable statements. However,

immaterial discrepancies or differences in the statements of witnesses do not affect their credibility unless it should plainly appear that some witness has willfully testified falsely.

When a witness is thus impeached, the jury has the right to disregard his or her evidence and treat it as untrue except where it is corroborated by other credible testimony or by the facts and circumstances proved during the trial or the sentencing hearing.

The defendant has not taken the stand to testify as a witness, but you shall place no significance on this fact. The burden is on the state to prove beyond a reasonable doubt any aggravating circumstance relied on. He is not required to take the stand in his own behalf, and his election not to do so cannot be considered for any purpose against him, nor can any inference be drawn from such fact.

Generally, a witness may not testify as to his opinions or conclusions. But the Court may permit a witness who has special knowledge or experience [p. 2196] on a particular question to testify as an expert on that question. An expert witness may state an opinion and give reasons for his testimony.

Expert testimony should be received by you with caution. While expert testimony is sometimes the only means of, or the best way of, reaching the truth, yet it is largely a field of speculation beset with pitfalls and uncertainties and requires careful and intelligent evaluation on your part if it is to be a valid means of reaching the truth.

You are not bound to accept expert testimony, but you should give it such weight and value as you think it deserves, along with all the other evidence in the case, governed by the purpose of arriving at the truth.

For the purpose of your deliberation and the return of your verdict, you are not to consider, speculate on, or discuss matters pertaining to the implementation of your verdict. You are to assume that whether you impose a sentence of death or of life imprisonment, the verdict you impose will be carried out.

Some of you may have been exposed to pretrial publicity in this case. I instruct you that you can consider no information in reaching your verdict other [p. 2197] than the evidence you hear in the courtroom. That should be "have heard in the courtroom." It would be further impermissible for you to mention during deliberations to any other juror any information that you recall seeing, hearing, or reading in the media or otherwise related to this case other than what you hear or see in the courtroom. This case must be decided solely upon the evidence that you heard in the courtroom.

You have reported that you have found the defendant, Donald Ray Middlebrooks, guilty of murder in the first degree. The offense of murder in the first degree is punishable by death by electrocution or by imprisonment for life.

Members of the Jury, you must decide from all the proof in this case whether or not the punishment shall be death by electrocution or life imprisonment in Count One of this case.

Our statutory law provides that the Jury shall fix the punishment after a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be unanimous as to either form of punishment.

You have now heard all the evidence to be presented in the trial and the sentencing hearing [p. 2198] of this case, including all the evidence as to whether there were any aggravating circumstances and whether there were any mitigating circumstances, all of which you will carefully weigh and consider. You shall not take account of any other facts or circumstances as the basis for deciding whether the death penalty would be appropriate in this case.

No death penalty shall be imposed unless you unanimously find that the state, during the trial and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specified statutory aggravating circumstances:

Number one. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

Number two. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit kidnapping.

In determining whether or not the state has proved aggravating circumstance number one above, you are governed by the following definitions:

Heinous means grossly wicked or reprehensible, abominable, odious, vile.

[p. 2199] Atrocious means extremely evil or cruel, monstrous, exceptionally bad, abominable.

Cruel means disposed to inflict pain or suffering, causing suffering, painful.

Torture means the infliction of severe physical or mental pain upon the victim while he remains alive and conscious.

Depravity means moral corruption, wicked or perverse act.

In determining the alleged aggravating circumstance number two, you are to refer to the following definitions:

Kidnapping is defined as follows:

Any person who forcibly or unlawfully confines, inveigles, or entices away another with the intent to cause him to be secretly confined against his will is guilty of the offense of kidnapping.

A confinement of a person is deemed to be against the person's will if assent to the confinement is induced by force, threat, or deception.

To inveigle a person means to lure, entice, or lead him astray by false representations, promises, or by other deceitful means.

To kidnap a person means to forcibly or unlawfully confine, inveigle, or entice away another [p. 2200] with the intent to cause him to be secretly confined.

Before you may find that either one of the aggravating circumstances exists, each of you must unanimously agree that the state has proved that circumstance as defined hereinbefore beyond a reasonable doubt.

You are to presume that any alleged aggravating circumstance does not exist. This presumption remains unless and until each and every one of you is satisfied from the evidence that the specific aggravating circumstance is proved. If you have a doubt, based upon reason, concerning any of the aggravating circumstances, you shall not use that circumstance in the course of further deliberations.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily as to the certainty of your findings. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty is not demanded by the law to determine the certainty of your findings, but moral certainty is required as to every proposition of proof requisite to determine the certainty of your findings as to the aggravating circumstance or circumstances.

[p. 2201] Your determination may not proceed further unless and until you unanimously find beyond a reasonable doubt that one or more specified aggravating circumstances exists. If you are unable to reach such an agreement after reasonable and diligent effort, your verdict shall be life, and you shall proceed no further.

If you unanimously determine that the state has proved beyond a reasonable doubt one or more of the

specified aggravating circumstances, then you must go on to consider mitigating circumstances.

As to a determination of mitigating circumstances, you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight, nor are you to gauge whether their existence is shown beyond a reasonable doubt. Instead, when you consider mitigating circumstances, each of you must decide for yourself whether mitigating circumstances may exist and if so, how much weight each deserves. If you conclude that any evidence supports a mitigating circumstance, then you should consider that mitigating circumstance to be established and then determine the weight to which it is entitled.

Tennessee Code Annotated Section 39-2-203, [p. 2202] subpart J, provides that in arriving at the punishment, the Jury shall consider as heretofore indicated any mitigating circumstances which shall include, but not be limited to, the following:

Number one. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Number two. The defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.

Number three. The defendant acted under extreme duress or under the substantial domination of another person.

Number four. The youth or advanced age of the defendant at the time of the crime.

Number five. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication, which was insufficient to establish a defense to the crime, but which substantially affected his judgment.

Number six. Any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is [p. 2203] supported by the evidence.

If the jury unanimously determines that one or more statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and that the aggravating circumstance or circumstances outweigh any mitigating circumstances, the sentence shall be death. If the death penalty is the decision of the Jury, the members of the Jury shall then complete the attached form entitled, Punishment of Death. The Jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found.

Further, the Jury must include in its finding that the statutory aggravating circumstance or circumstances so found outweigh any mitigating circumstances. Upon such unanimous finding, each member of the Jury shall affix his or her signature to the said written finding and then return said written verdict to the Court.

If the Jury unanimously determines that no statutory aggravating circumstance or circumstances have been

proved by the state beyond a reasonable doubt, or if the jury unanimously determines that the statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable [p. 2204] doubt, but that said circumstance or circumstances do not outweigh any mitigating circumstances, the punishment shall be life imprisonment.

I further instruct you that if the weight of the mitigating circumstances equals the weight of any or all aggravating circumstances you find to be proven beyond a reasonable doubt, your verdict must be life. The Members of the Jury shall then complete the attached form entitled, Punishment of Life Imprisonment, by affixing their signatures thereto and returning the written verdict of the Jury to the Court.

You are to complete and sign only the appropriate punishment form. The other punishment form is to be left incomplete and unsigned.

You can have no prejudice or sympathy or allow anything but the law and the evidence to have any influence upon your verdict. You must render your verdict with absolute fairness and impartiality as you think justice and truth dictate.

The verdict must represent the considered judgment of each Juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with [p. 2205] one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual

judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect or the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You may now retire to the jury room for your deliberations in setting punishment for the defendant solely and alone upon the evidence introduced upon the trial and sentencing hearing.

* * *

Verdict from Sentencing Phase

* * *

[p. 2215] THE COURT: Let me ask you if the jury has reached a unanimous verdict as to [p. 2216] punishment?

JURY FOREPERSON: Yes.

THE COURT: Has the appropriate form been completed and/or signed by you and by each member of the jury?

JURY FOREPERSON: Yes.

THE COURT: Mr. Middlebrooks, if you would stand and face the jury.

(WHEREUPON, the defendant stands.)

THE COURT: Ms. Lanham, I will ask if you will announce the verdict of the jury.

JURY FOREPERSON: Punishment of death.

THE COURT: Would you pass the form to the court officer, and pass that to me. You may be seated. Mr. Middlebrooks you may be seated and counsel.

I am going to read for the record the form filled out by the jury, and then you will be polled as to your verdict.

The form completed and submitted to the court is that entitled Punishment of Death. We, the jury, unanimously find the following listed [p. 2217] statutory,

aggravating circumstance or circumstances. The jury has listed in writing the murder was especially heinous, atrocious or cruel and that it involved torture. The murder was committed while the defendant was engaged in committing kidnapping. The form further provides, we [sic] that the jury unanimously find that the statutory aggravating circumstance or circumstances so listed above outweigh the mitigating circumstance or circumstances. And further provides: Therefore, we, the jury, unanimously find that the punishment for the defendant, Donald Wayne Middlebrooks, shall be death.

I have reviewed the form and it appears to have been signed by the foreperson and each juror. The jury at this time will be polled as to whether this is your signature and your verdict that was announced by your foreperson, and is provided for in this form. And the clerk will call your name and say, "Is this your signature and verdict." The reference to signature refers to the verdict form.

(WHEREUPON, the jury was polled and all answered affirmatively.)

Judgment of the Supreme Court

SUPREME COURT, NASHVILLE

MB67B/326

STATE OF TENNESSEE Plaintiff-Appellee	Appeal No. 01S01-9102-CR-00008
vs.	Davidson Criminal No. 87-F-1682 Below
DONALD RAY MIDDLEBROOKS, Defendant-Appellant	Offense: First-degree Felony Murder and Aggravated Kidnapping.
	DEATH PENALTY
	Conviction Affirmed; Sentence Reversed and Remanded for Re-sentencing.

JUDGMENT

Came the appellant, Donald Ray Middlebrooks, by counsel, and also came the Attorney General on behalf of the State, and this case came on to be heard upon the record on appeal from the Criminal Court of Davidson County; and upon consideration thereof, this Court affirms appellant's conviction, but reverses the sentence on the grounds that the aggravating circumstance set out in Tenn. Code Ann. § 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder.

In accordance with the opinion filed herein, it is, therefore, ordered and adjudged by this Court that the

appellant's conviction of guilt is affirmed. It is further ordered and adjudged by this Court that the case is remanded to the Criminal Court of Davidson County for re-sentencing where the State will be free to reseek the death penalty if it so desires.

The State of Tennessee will pay the costs of this appeal. 9/8/92.

(Drowota and O'Brien, JJ., concurring in Parts I and II and dissenting in Part III – Separate Opinion.
Reid, C.J., and Daughtrey, J., concurring in Parts I and III and dissenting in Part II – Separate Opinion)